Supreme Court, U.S.
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No. 00-____

IN THE

Supreme Court of the United States

DEBORIS CALCANO-MARTINEZ, ET AL.,
Petitioners,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Appendix A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 1999

(Argued March 30, 2000 Decided September 1, 2000)

Docket Nos. 98-4033, 98-4214, 98-4246

DEBORIS CALCANO-MARTINEZ,

Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

SERGIO MADRID,

Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

FAZILA KHAN,

Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Before:

OAKES, WALKER, and KEITH,*

Circuit Judges.

Lawful permanent resident aliens filed separate petitions for review of final orders of removal, seeking review of decisions of Board of Immigration Appeals that they were removable by reason of having been convicted of a certain crime and ineligible to apply for discretionary relief from deportation. Cases were consolidated. We hold that under the permanent rules of the Illegal Immigration Reform and Immigrant Responsibility Act, a court of appeals lacks jurisdiction over petitions for review filed by the aliens. We further hold that the permanent rules of the Illegal Immigration Reform and Immigrant Responsibility Act do not deprive federal district courts of habeas jurisdiction over purely legal claims of aliens ordered removed from the United states for having committed specific crimes.

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* The Honorable Damon J. Keith of the United States Court of Appeals for the Sixth Circuit, sitting by designation.

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OAKES, *Senior Circuit Judge*:

The consolidated cases before the Court require us to interpret the effect of the permanent rules of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009-546 (1996), on the jurisdiction of federal courts to hear challenges raised by criminal aliens with respect to removal proceedings commenced by the Immigration and Naturalization Service ("INS"). In three opinions handed down in the last three years, we considered the effect of various provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996) and the transitional rules of IRRIRA on a federal court's jurisdiction to review removal proceedings. This is our first occasion to examine the effect of IIRIRA's permanent rules in the same context.

In enacting the AEDPA and IIRIRA in 1996, Congress reworked the role of the courts in immigration decisions by severely limiting judicial review of final orders of deportation for certain classes of aliens. By enacting these laws, Congress clearly meant to speed the removal of legal permanent residents convicted of certain crimes from the United States by curtailing the availability of judicial review of their removal orders. *See* H.R. Rep. No. 104-879 at 251-61 (1997), 1997 WL 9288; H.R. Conf. Rep. No. 104-828, at 495-507 (1997), 1997 WL 563320. In our first decision interpreting Congress's 1996 amendments, we held that the AEDPA "repealed the jurisdiction a court of appeals formerly had over petitions for review filed by aliens convicted of [certain criminal offenses]." *Hincapie-Nieto v. INS*, 92 F.3d 27, 28 (2d Cir. 1996). Two years later, we held that under the transitional rules of IIRIRA, federal courts retained habeas jurisdiction under 28 U.S.C. § 2241. *See Jean-Baptiste v. Reno*, 144 F.3d 212, 220 (2d Cir.), *reh'g denied*, 175 F.3d 226 (2d Cir. 1998). Four months after our decision in *Jean-Baptiste*, we examined the scope of the remaining habeas review and held that federal courts retained jurisdiction to review statutory and constitutional challenges to deportation orders. *See Henderson v. INS*, 157 F.3d 106, 122 (2d Cir. 1998), *cert. denied*, *Reno v. Navas*, 526 U.S. 1004 (1999).

The three petitioners before us, Deboris Calcano-Martinez, Sergio Madrid, and Fazila Khan, are legal permanent residents of the United States who have been ordered deported because of prior criminal convictions. Each has filed a petition for review in this Court pursuant to INA § 242(a)(2), codified at 8 U.S.C. § 1252(a)(2), challenging the final orders of removal entered against them by the Board of Immigration Appeals ("BIA"). Each petitioner has also filed a petition for habeas corpus in a United States district court.

The petitions of Calcano-Martinez and Madrid were dismissed without prejudice to refiling after this Court's mandate in the present case, and Khan's petition is pending in the Eastern District of New York. On appeal, the petitioners do not dispute that they are aliens with criminal convictions that render them deportable under the Immigration and Naturalization Act ("INA"). Rather, they raise statutory challenges to the Attorney General's interpretation of the immigration laws under which they face deportation and constitutional challenges to the statute itself.

The INS argues that this Court does not have jurisdiction to hear these petitions. We hold, for the reasons set forth herein, that INA § 242(a)(2)(C) bars this Court from reviewing claims against final orders of removal filed by certain classes of criminal aliens, including the petitioners. We also hold that IIRIRA's permanent rules do not repeal a federal court's jurisdiction to review criminal aliens' removal orders by writ of habeas corpus under 28 U.S.C. § 2241. In doing so, we follow decisions by the Third and Ninth Circuit Courts of Appeals and the principles set forth in our prior cases interpreting the immigration laws. Accordingly, we dismiss the petitions without prejudice to the same claims being brought pursuant to habeas petitions.

I. BACKGROUND

A. Deboris Calcano-Martinez.

Deboris Calcano-Martinez is a native and citizen of the Dominican Republic who was admitted to the United States as a lawful permanent resident in 1971, when she was three years old. She has four children who are United States citizens. On October 9, 1996, Calcano was sentenced to one to three years' imprisonment based on

her April 24, 1996, guilty plea to attempted criminal sale of heroin in the third degree, in violation of §§ 110 and 220.39 of the New York Penal Law.

On June 16, 1997, the INS commenced removal proceedings against Calcano-Martinez by filing a Notice to Appear. *See* 8 C.F.R. § 239.1(a) (1999). The notice charged that Calcano-Martinez's narcotic conviction rendered her deportable from the United States pursuant to INA §§ 237(a)(2)(A)(iii) and (a)(2)(B)(i), codified at 8 U.S.C. §§ 1227(a)(2)(A)(iii), (a)(2)(B)(i) (1999), as an alien convicted of an aggravated felony and as an alien convicted of a violation of a controlled substance law.[1]

A removal hearing, at which Calcano-Martinez was represented by counsel, was held before an Immigration Judge ("IJ"). At the end of the hearing, the IJ ordered Calcano-Martinez deportable as charged by the INS and ruled that, based on her criminal convictions, she was statutorily ineligible for any relief from removal. Calcano-Martinez timely appealed the IJ's decision to the BIA. The BIA dismissed her appeal. On January 29, 1998, Calcano filed a petition for review in this Court. On October 13, 1999, Calcano filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of New York. *See Calcano-Martinez v. Reno*, No. 99 Civ. 10481 (S.D.N.Y. filed Oct. 13, 1999). By stipulation and order dated December 20, 1999, Calcano's habeas petition was dismissed without prejudice to refiling after this Court's mandate in the instant case.

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[1] INA § 237(a)(2)(A)(iii) provides that "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable." INA § 237(a)(2)(B)(i) states that "[a]ny alien who at any time after admission has been convicted of a violation of . . . any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . is deportable."

B. Sergio Madrid.

Sergio Madrid is a native and citizen of Mexico who remained in the United States unlawfully until his status was adjusted to lawful permanent resident of the United States at the age of seventeen. On September 6, 1994, Madrid was sentenced to a prison term of four years to life based on his conviction for the criminal sale of a controlled substance in the second degree, in violation of § 220.41 of the New York Penal Law.

On June 24, 1997, the INS commenced removal proceedings against Madrid by filing a Notice to Appear. The notice charged that Madrid's narcotic conviction rendered him deportable from the United States as an alien convicted of an aggravated felony and as an alien convicted of a violation of a controlled substance law. *See* 8 U.S.C. §§ 1227(a)(2)(A)(iii), (a)(2)(B)(i); 8 U.S.C. § 1101(a)(43).[2] A removal hearing was held before an IJ and at the close of the hearing, the IJ rendered Madrid deportable. Madrid appealed the BIA's decision and on May 4, 1998, the BIA dismissed his appeal. On June 4, 1998, Madrid filed a petition for review in this Court. On October 13, 1999, Madrid filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of New York. *Madrid v. Reno*, No. 99 Civ. 10482 (S.D.N.Y. filed Oct. 13, 1999). By stipulation and order dated December 20, 1999, Madrid's habeas petition was dismissed without prejudice to refiling after this Court's mandate in the instant case.

C. Fazila Khan.

Fazila Khan is a native and citizen of Guyana who was admitted to the United States as a lawful permanent

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[2] INA § 101(a)(43), codified at 8 U.S.C. § 1101(a)(43), defines "aggravated felony" as a crime involving "illicit trafficking in a controlled substance."

resident on September 2, 1987. Khan's family, including her mother and sister as well as five of her aunts and uncles, are also United States citizens. She also has a four-year-old daughter who is a United States citizen. On February 13, 1997, Khan was sentenced to a prison term of four months, to be followed by a period of supervised release for one year, in connection with her November 6, 1996, guilty plea to the use of a telephone to facilitate the distribution of heroin in violation of 21 U.S.C. §§ 843(b), (d).

In May 1997, the INS commenced removal proceedings against Khan by filing a Notice to Appear. The notice charged that her offense rendered her deportable as an alien convicted of an aggravated felony. *See* INA § 237(a)(2)(A)(iii), codified at 8 U.S.C. § 1127(a)(2)(A)(iii); 8 U.S.C. § 1101(a)(43)(B).

A removal hearing was held before an IJ and Khan, represented by counsel, denied that she was deportable as charged. On July 24, 1997, the IJ ordered her deportable. Khan timely appealed the IJ's decision. On May 28, 1997, the BIA issued a decision dismissing Khan's appeal. On June 29, 1998, Khan filed a petition for review in this Court. On October 13, 1998, Khan also challenged her removal order by filing a petition for a writ of habeas corpus in the United States District Court for the Eastern District of New York. *Khan v. Reno*, No. CV 99-6515 (E.D.N.Y. filed Oct. 13, 1999). That petition is pending.

D. INA § 212(c) Waiver from Deportation.

Under former INA § 212(c), codified at 8 U.S.C. § 1182(c) (1996), the Attorney General had discretionary authority to waive the deportation of an alien deportable because of a prior conviction where deportation would cause extraordinary hardship to the deportee or his or her

family. The permanent rules of IIRIRA, effective April 1, 1997, repealed § 212(c) in its entirety and replaced it with another form of relief entitled "cancellation of removal," found at new INA § 240A, codified at 8 U.S.C. § 1229b (1999). *See* IIRIRA §§ 304(a), (b), 110 Stat. at 3009-587-594. That relief, permitting the Attorney General to waive deportation for certain classes of aliens, is categorically not available to an alien convicted of a crime that qualifies as an "aggravated felony" under the statute. *See id.* The petitioners are each ineligible for "cancellation of removal" because their convictions qualify as "aggravated felonies" under the INA. *See* INA § 240A, codified at 8 U.S.C. § 1229b (1999); 8 U.S.C. § 1101(a)(43).

In their petitions for review to this Court, the petitioners argue that the BIA erred by interpreting IIRIRA § 304's repeal of § 212(c) relief and replacement with "cancellation of removal" to apply retroactively to an alien who is convicted before April 1, 1997, the effective date of IIRIRA § 304(a).[3] The petitioners further contend that if IIRIRA is interpreted to apply retroactively to pre-enactment convictions, § 304(a) of IIRIRA is unconstitutional because it violates their rights guaranteed under the due process and equal protection clauses of the U.S. Constitution.

II. DISCUSSION

We must consider whether we have jurisdiction over the petition before us. Implicit in this question is whether IIRIRA's permanent rules repealed habeas corpus jurisdiction to review final removal orders entered

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[3] At argument, counsel for the petitioners alternatively argued that IIRIRA §§ 304(a), (b) should not apply retrospectively to guilty pleas entered to deportable crimes prior to IIRIRA's effective date.

against a legal resident alien who is removable because of a prior conviction. *See Liang v. INS*, 206 F.3d 308, 312-13 (3d Cir. 2000) (noting the interrelationship between jurisdiction over a petition for review and habeas corpus). The permanent rules of IIRIRA are Congress's most recent enactment, in a line of many, on the subject of the judicial review available over immigration decisions. A complete discussion of the history of judicial review of immigration orders is set forth in this Court's decision in *Henderson*, 157 F.3d at 112-17. For our purposes on this appeal, it is necessary to begin with the 1996 amendments to the INA.

A. The AEDPA.

In April of 1996, Congress enacted the AEDPA, which included two provisions relevant to the judicial review of immigration decisions. Prior to the enactment of the AEDPA, INA § 106(a)(10) provided that "any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings." 8 U.S.C. § 1105a(a)(10) (1996). Section 401(e) of the AEDPA, entitled "Elimination of Custody Review by Habeas Corpus," explicitly repealed prior INA § 106(a)(10). *See* AEDPA § 401(e), 110 Stat. at 1268. Section 440(a) was enacted to replace the repealed provision and substitute the following language:

> (10) Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i), shall not be subject to review by any court.

AEDPA § 440(a), 110 Stat. at 1276-77, codified at 8 U.S.C. § 1105a(a)(10) (1996) (repealed by IIRIRA § 306(b), 110 Stat. at 3009-612, September 30, 1996, with respect to deportation proceedings commenced after April 1, 1997).

In *Hincapie-Nieto*, 92 F.3d at 29-30, we held that § 440(a) repealed a court of appeals's pre-existing jurisdiction over petitions for review filed by aliens ordered deported because of the convictions specified. In holding that our jurisdiction over a petition for review was repealed, we noted that "[t]he absence of an opportunity for some aliens to file a petition for review in a court of appeals does not necessarily mean . . . that the federal courts are closed to all claims by such aliens arising in the course of deportation proceedings." *Id.* at 30. In *Hincapie-Nieto*, it was not necessary to determine whether district courts continued to have 28 U.S.C. § 2241 habeas jurisdiction over final deportation orders after the AEDPA. In dicta, however, we stated that no constitutional infirmity appeared to arise from AEDPA § 440(a)'s repeal of our jurisdiction because the INS assured that at least some avenue for judicial relief remained available through a challenge to detention by application for habeas corpus. *See id.* at 30-31.

Our suggestion in *Hincapie-Nieto* that AEDPA § 440(a)'s bar of judicial review under the INA was constitutional because courts might review deportation orders through habeas corpus petitions was in accord with the vast majority of courts of appeals to consider the same issue. *See Mansour v. INS*, 123 F.3d 423, 426 (6th Cir. 1997); *Mendez-Morales v. INS*, 119 F.3d 738, 739 (8th Cir. 1997); *Williams v. INS*, 114 F.3d 82, 83-4 (5th Cir. 1997); *Fernandez v. INS*, 113 F.3d 1151, 1154-55 (10th Cir. 1997); *Chow v. INS*, 113 F.3d 659, 668-70 (7th Cir. 1997); *Boston-Bollers v. INS*, 106 F.3d 352, 354 n.1 (11th Cir. 1997); *Kolster v. INS*, 101 F.3d 785, 790-

91 (1st Cir. 1996); *Salazar-Haro v. INS*, 95 F.3d 309, 311 (3d Cir. 1996); *Duldulao v. INS*, 90 F.3d 396, 400 n.4 (9th Cir. 1996).

B. IIRIRA's Transitional Rules.

Five months after enacting the AEDPA, on September 30, 1996, Congress enacted IIRIRA, which further narrowed judicial review for legal residents ordered removable because they were convicted of certain crimes. IIRIRA contains two sets of provisions. The transitional rules (which are not codified in the U.S. Code) control deportation proceedings commenced prior to April 1, 1997. *See* IIRIRA § 309(c), 110 Stat. at 3009-625. Section 309(c)(4)(G) of IIRIRA's transitional rules is the successor to AEDPA § 440(a) and provides in more absolute language that "there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in [the deportation proceedings of the INA]." IIRIRA § 309(c)(4)(G), 110 Stat. at 3009-626, codified at 8 U.S.C. § 1101 note (1999).

In addition, IIRIRA § 306(a) amends INA § 242(g) to provide:

> Exclusive Jurisdiction. Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Chapter.

IIRIRA § 306(a), 110 Stat. at 3009-612, codified at 8 U.S.C. § 1252(g) (1999). Although INA § 242(g) is listed with the permanent provisions, IIRIRA § 306(c)

makes § 242(g) applicable to both transitional and permanent rules cases. *See* IIRIRA § 306(c), 110 Stat. at 3009-612.

In *Jean-Baptiste*, 144 F.3d at 214-18, this Court considered whether INA § 242(g) divested federal courts of jurisdiction over a case where legal residents, ordered deported because of a criminal conviction, maintained that their right to due process was violated because they had never been given notice that their criminal conviction could subject them to consequences under the immigration laws. Finding that plaintiffs' claims arose out of "the decision of the Attorney General to commence proceedings, adjudicate cases, or execute removal orders," this Court held that INA § 242(g) deprived federal courts of jurisdiction to hear plaintiffs' claims. *See id.* at 218.

We reasoned, however, that all review had not been eliminated by INA § 242(g) or the AEDPA. *See id.* Relying on the doctrine articulated in *Felker v. Turpin*, 518 U.S. 651, 659-61 (1996), that repeal by implication of the right to petition for habeas corpus relief is disfavored, we held that:

> Nothing in the language of either the [AEDPA] or [IIRIRA] suggests that Congress expressly repealed § 2241, limited its scope, or eliminated the jurisdiction of the district courts under that statute to entertain petitions seeking writs of habeas corpus. Those two Acts therefore do not specifically exclude habeas review in deportation cases under § 2241 . . . .

Id. at 219. Therefore, in *Jean-Baptiste*, this Court concluded that the AEDPA and IIRIRA's transitional rules did not repeal the habeas jurisdiction granted to federal courts by Congress in 28 U.S.C. § 2241 to review challenges to final deportation orders. We left open the question of the scope of the habeas review of immigration

decisions available under 28 U.S.C. § 2241. *See id.* at 220.

Our decision in *Jean-Baptiste* is in accord with the majority of circuits also to hold that the language of § 242(g) did not repeal habeas jurisdiction over immigration decisions. The First, Third, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuit Courts of Appeals held that habeas jurisdiction to review final deportation decisions survived the AEDPA and IIRIRA transitional rules' streamline of the judicial review available under the INA. *See Magana-Pizano v. INS*, 200 F.3d 603, 609 (9th Cir. 1999); *Pak v. Reno*, 196 F.3d 666, 673 (6th Cir. 1999); *Bowrin v. INS*, 194 F.3d 483, 489 (4th Cir. 1999); *Requena-Rodriquez v. Pasquarell*, 190 F.3d 299, 306 (5th Cir. 1999); *Jurado-Gutierrez v. Greene*, 190 F.3d 1135, 1145-46 (10th Cir. 1999), *cert. denied*, *Palaganas-Suarez v. Greene*, ___ U.S. ___, 120 S. Ct. 1539 (2000); *Shah v. Reno*, 184 F.3d 719, 723-24 (8th Cir. 1999); *Mayers v. INS*, 175 F.3d 1289, 1301 (11th Cir. 1999); *Sandoval v. Reno*, 166 F.3d 225, 236-37 (3d Cir. 1999); *Goncalves v. Reno*, 144 F.3d 110, 119-23 (1st Cir. 1998), *cert. denied*, *Reno v. Goncalves*, 526 U.S. 1004 (1999). Only the Seventh Circuit has held that the transitional rules of IIRIRA effected a repeal of habeas jurisdiction over final deportation orders. *See LaGuerre v. Reno*, 164 F.3d 1035, 1040 (7th Cir. 1998), *cert. denied*, *Reno v. LaGuerre*, ___ U.S. ___, 120 S. Ct. 1157 (2000).

In *Henderson*, 157 F.3d at 118-22, we reaffirmed our synthesized holding of *Hincapie-Nieto* and *Jean-Baptiste* that under the INA, modified by the AEDPA and IIRIRA's transitional rules, an alien ordered deported because of a criminal conviction cannot seek a petition for review in the court of appeals but must pursue a claim in a habeas proceeding pursuant to 28 U.S.C. § 2241. Although the panel questioned the wisdom of

having the channel for review be by habeas in the district court rather than by petition for review in the courts of appeals, it acknowledged that it was bound by a reasonable comprehension of the statute and Second Circuit precedent. *See id.* at 119 n.9; *see also Jean-Baptiste*, 175 F.3d at 226 (denying a subsequent petition for rehearing despite the *Henderson* panel's questioning).

We also considered in *Henderson* the breadth of review available under habeas corpus, the question left open after *Jean-Baptiste*. The INS argued that review only of "substantial" constitutional claims remained and that the courts were without power to review the Attorney General's interpretation of the immigration laws. *See Henderson*, 157 F.3d at 119-20. We soundly rejected the INS's argument and held that federal courts have jurisdiction under 28 U.S.C. § 2241 to consider all claims that are purely legal in nature—including constitutional challenges and claims that the Attorney General misinterpreted the immigration laws. *See id.* at 122.

C. IIRIRA's Permanent Rules.

The permanent rules of IIRIRA govern deportation proceedings initiated after April 1, 1997. *See* IIRIRA § 309(c), 110 Stat. at 3009-625. The parties agree that because deportation proceedings were not initiated against any of the petitioners until after April 1, 1997, the permanent rules apply to their cases. The permanent rules revamp the INA by striking 8 U.S.C. § 1105(a) in its entirety and relocating the rules governing judicial review of deportation orders to 8 U.S.C. § 1252. *See* IIRIRA § 306(a), 110 Stat. at 3009-607-612.

The INS argues that the court of appeals is the exclusive forum for all immigration matters, invoking several provisions of the permanent rules in support of its position that IIRIRA, in its final form, divests district courts

of their habeas jurisdiction. The INS calls our attention to newly added INA §§ 242(a)(1), 242(a)(2)(C), 242(e)(2), 242(g) and 242(b)(9). *See* IIRIRA § 306(a), 110 Stat. at 3009-607-612. Section 242(a)(1) of the INA provides:

> Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of Title 28 [the Hobbs Act] . . . .

8 U.S.C. § 1252(a)(1) (1999). The INS argues that because the Hobbs Act gives exclusive jurisdiction to the court of appeals, *see* 28 U.S.C. § 2342 ("The court of appeals . . . has exclusive jurisdiction" over specified agency orders), § 242(a)(1) evidences Congress's intent to eradicate habeas review.

Section 242(a)(2)(C) of the INA is the successor to AEDPA § 440(a) and IIRIRA § 309(c)(4)(g) and in its final form now states:

> Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in [the deportation sections of the INA].

8 U.S.C. § 1252(a)(2)(C) (1999). The INS argues that when it added the "notwithstanding any other provision of law" phrase to the final incarnation of this section, Congress explicitly repealed habeas jurisdiction.

The INS also relies on INA § 242(e)(2). This section provides:

> Judicial review of any determination made under section 1225(b)(1) of this title is available in habeas corpus proceedings, but shall be limited to determinations of—

> (A) whether the petitioner is an alien,
>
> (B) whether the petitioner was ordered removed under such section, and
>
> (C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157, or has been granted asylum under section 1158, such status not having been terminated, and is entitled to such further inquiry as prescribed by the Attorney General pursuant to section 12255(b)(1)(C) of this title.

8 U.S.C. § 1252(e)(2) (1999). The INS contends that because INA § 242(e)(2) provides for statutory habeas review under the delineated circumstances, Congress knew how to create habeas review under the INA when it so desires. It follows, according to the INS, that Congress's decision to omit analogous language in regard to an alien's challenge to his or her final deportation order demonstrates its intent that this review be unavailable.

The INS additionally points to INA § 242(g), a section already considered by this Court in *Henderson*. Section 242(g) provides:

> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Chapter.

8 U.S.C. § 1252(g) (1999).

Finally, § 242(b)(9), upon which the INS rests its principal argument provides:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section.

8 U.S.C. § 1252(b)(9) (1999). The INS argues that because INA § 242(b)(2) requires that all petitions for review "be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings," § 242(b)(9) necessarily divests any court of jurisdiction other than the appropriate court of appeals. In support of this argument, the INS points to the Supreme Court's recent characterization in dicta of § 242(b)(9) as a "zipper clause" that channels all review of removal decisions under the INA into the court of appeals. *See Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999) ("AADC").

Four courts of appeals have considered arguments similar to those presented by the INS in this case. The Fifth and Eleventh Circuit Courts of Appeals adopted the INS's position; the Third and Ninth rejected it.

In *Richardson v. Reno*, 180 F.3d 1311, 1312-13 (11th Cir. 1999) ("*Richardson II*"), *cert. denied*, *Richardson v. Reno*, ___, U.S. ___, 120 St. Ct. 1529 (2000), the Eleventh Circuit reaffirmed its holding in *Richardson v. Reno*, 162 F.3d 1338 (11th Cir. 1998) ("*Richardson I*"), after reconsideration in light of the Supreme Court's decision in *AADC*, that IIRIRA's permanent rules eliminated § 2241 habeas jurisdiction over an alien's challenge to his or her removal proceedings. The court held that INA § 242(b)(2), § 242(e)(2) and the AEDPA's elim-

ination of habeas review in § 401(e) evidenced Congress's intent to preclude statutory habeas review over immigration decisions. *See id.* at 1314. More specifically, the court held that INA § 242(b)(9) and the Supreme Court's description of that section in *AADC* as a "zipper clause" that channels judicial review of immigration decisions exclusively into that provided by the INA, was evidence that Congress intended to repeal all habeas review. *See id.* at 1314-15. The court concluded that the repeal of habeas jurisdiction to review immigration decisions is not unconstitutional because judicial review still remains under INA § 242(a)(2)(C) to determine whether the petitioner is an alien, is deportable, and deportable for a reason covered by INA § 242(a)(2)(C). *See id.* at 1315-16. Furthermore, the court said, review of substantial constitutional questions and challenges to the constitutionality of the INA itself remains available because INA § 242(a)(2)(C) does not literally foreclose constitutional challenges to the statute itself. *See id.* at 1316 n.5.

In *Max-George v. Reno*, 205 F.3d 194, 197-98 (5th Cir. 2000), the Fifth Circuit followed the lead of the Eleventh Circuit and agreed with the INS that 28 U.S.C. § 2241 habeas jurisdiction had been repealed by IIRIRA's permanent rules. According to the Fifth Circuit, Congress need not explicitly mention habeas jurisdiction generally or § 2241 by name to repeal habeas jurisdiction. *See id.* at 199 ("While Congress could theoretically have been more explicit by specifically mentioning habeas corpus in general or § 2241 in particular, we believe the jurisdictional limitation described throughout § 1252 was sufficiently explicit."). Accordingly, the court reasoned that, unlike the language in IIRIRA's transitional rules, the jurisdiction-stripping provisions in the permanent rules, beginning with the far more preclusive language "notwithstanding any other provisions of law," explicitly

repealed § 2241 habeas jurisdiction over immigration decisions. *Id.* at 198. The Fifth Circuit, like the Eleventh Circuit, reasoned that the repeal was not unconstitutional because sufficient judicial review remained available for criminal aliens' challenges against removal under INA § 242(a)(2)(C). *See id.* at 199-201. It did not go as far, however, as the Eleventh Circuit to hold that review of constitutional and statutory claims were preserved. It held instead that the court of appeals retains jurisdiction under § 242(a)(2)(C) only to determine whether the prerequisites for precluding review are met, whether the provisions classifying the petitioner in a specific criminal category are constitutionally applied, and whether the level of judicial review remaining in a particular case satisfies the Constitution. *See id.*

In *Liang v. INS*, 206 F.3d 308, 316-18 (3d Cir. 2000), the Third Circuit parted ways with the Fifth and Eleventh Circuits, holding that because none of the sections in § 1252 expressly refers to habeas jurisdiction or to § 2241, none expressly revoked habeas jurisdiction. The court reasoned that the Supreme Court did not, in *AADC*, decide that § 242(b)(9) radically eliminated habeas jurisdiction because that was not the issue raised in that case, and the Supreme Court explicitly noted that courts were in disagreement whether habeas jurisdiction remained after IIRIRA. *See id.* at 319. The Third Circuit also disagreed with the Fifth and Eleventh Circuits' conclusion that sufficient judicial review remained under § 242(a)(2)(C) so that the repeal of habeas was not unconstitutional, and continued to adhere to its earlier ruling in *Sandoval*, 166 F.3d 225, that the language of § 242(a)(2)(C) makes clear that the court of appeals lacks jurisdiction over petitions of review filed by aliens removable because of prior convictions. *See id.* at 321. Because no judicial review of criminal aliens' statutory and constitutional claims remains under § 242(a)(2)(C),

the court concluded that a repeal of habeas jurisdiction over immigration decisions raises serious constitutional questions. *See id.* at 321-22.

The Ninth Circuit, following the lead of the Third Circuit, held that IIRIRA's permanent rules do not use language explicit enough to repeal a federal court's habeas jurisdiction to review final removal orders. *See Flores-Miramontes v. INS*, 212 F.3d 1133, 1137-38 (9th Cir. 2000). The court reasoned that although the language of the permanent rules is stronger than that of the transitional provisions, the difference would not cause it to depart from its decision in *Magana-Pizano*, 200 F.3d 603, to find a repeal of 28 U.S.C. § 2241 jurisdiction over final removal orders. *See Flores-Miramontes*, 212 F.3d at 1137. Furthermore, the court held that § 242(b)(9) and the Supreme Court's remarks about that provision did not require the conclusion that habeas review is repealed. *See id.* at 1139. Finally, the court found that an interpretation that IIRIRA does not repeal habeas jurisdiction avoids a substantial constitutional question. *See id.* at 1141-42. In so doing, it rejected the INS's argument that review of substantial constitutional claims remained in the court of appeals under a petition for review. *See id.* at 1142.

We are persuaded by the Third and Ninth Circuits' reasoning in *Liang v. INS* and *Flores-Miramontes v. INS* that Article III courts continue to have habeas jurisdiction under 28 U.S.C. § 2241 over legal challenges to final removal orders. We conclude that the scope of this review includes statutory claims such as those raised by the petitioners in this case. We do not read any exceptions into INA § 242(a)(2)(C) that bars our jurisdiction over petitions to review removal orders against aliens convicted of certain crimes. It is also our view that our preservation of habeas jurisdiction under the permanent rules avoids the novel and profound constitutional ques-

tions that would arise were we to find that IIRIRA eliminates habeas jurisdiction over final immigration decisions.

We will not strain to infer that Congress radically repealed the federal courts' habeas jurisdiction to review final orders of removal. In *Felker*, 518 U.S. at 657, the Supreme Court considered whether Title I of the AEDPA, a statute limiting the right to file successive habeas petitions that specifically provided that a court of appeals's decision denying leave to file a successive petition could not be appealed or be the subject of a petition for rehearing or petition for *certiorari*, *see* 28 U.S.C. § 2244(b)(3)(E), deprived it of jurisdiction to entertain an original application for habeas relief. The Court concluded that because no provision of Title I explicitly mentioned its authority to entertain original habeas petitions, it would not find a repeal of habeas jurisdiction by implication. *See id.* at 660-61. In so holding, the Court restated its rule developed more than a century earlier in *Ex Parte Yerger*, 75 U.S. 85 (1868), that repeals of jurisdictional statutes by implication are not favored. *See Felker*, 518 U.S. at 660. This rule requires that a court cannot presume that a congressional enactment effects a repeal of a jurisdictional statute when it does not explicitly mention the jurisdictional statute or the general type of jurisdiction by name.

In *Jean-Baptiste*, 144 F.3d at 220, we determined that although the AEDPA and IIRIRA's transitional rules eliminated habeas corpus review under INA § 106(a)(10), neither specifically discussed 28 U.S.C. § 2241 or habeas jurisdiction generally. Following the rule articulated in *Felker*, we held that Congress did not repeal habeas corpus jurisdiction under 28 U.S.C. § 2241. *See id.* In order to find habeas jurisdiction eradicated, our precedent thus requires an explicit statement from Congress that mentions a repeal of habeas juris-

diction. The majority of other circuit courts have also held that Congress must explicitly mention § 2241 or general habeas jurisdiction to repeal it. *See Flores-Miramontes*, 212 F.3d at 1137; *Liang*, 206 F.3d at 320; *Magana-Pizano*, 200 F.3d at 608-9; *Pak*, 196 F.3d at 673; *Bowrin*, 194 F.3d at 489; *Jurado-Gutierrez*, 190 F.3d at 1145-46; *Shah*, 184 F.3d at 724; *Goncalves*, 144 F.3d at 119; *but see LaGuerre*, 164 F.3d at 1038-39.

Nothing in IIRIRA's permanent provisions requires us to stray from our determination in *Jean-Baptiste* that habeas review survives IIRIRA. Although the language is arguably more restrictive, there is still nothing in IIRIRA's permanent provisions that constitutes a sufficiently clear statement of congressional intent to repeal the habeas jurisdiction granted Article III courts by 28 U.S.C. § 2241. Although each new provision works to narrow or limit the judicial review available to the criminal aliens under the INA, INA §§ 242(a)(1), 242(a)(2)(C), 242(e)(2), and 242(g)[4] do not explicitly mention a repeal of a federal court's general habeas jurisdiction or 28 U.S.C. § 2241. *See* 8 U.S.C. §§ 1252(a)(1), (a)(2)(C), (e)(2), and (g) (1999). Judicial review and habeas corpus have distinct technical meanings under the law. *See Heikkila v. Barber*, 345 U.S. 229, 235-36 (1953); *see also Flores-Miramontes*, 212 F.3d at 1140 (citing *Sandoval*, 166 F.3d at 235). We will not infer that Congress meant to repeal habeas corpus review under 28 U.S.C. § 2241 when it mentioned only judicial review, a distinct and separate concept from habeas.

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[4] Indeed, the INS's argument that INS § 242(g) repeals § 2241 habeas jurisdiction over final deportation orders is foreclosed by the Supreme Court's decision in *AADC*, interpreting § 242(g) to apply only to the three discrete immigration decisions identified in the section. *See* 525 U.S. at 482.

Felker's requirement that Congress provide an explicit statement in order to repeal habeas jurisdiction is particularly relevant in this case. As the Ninth Circuit pointed out, *Felker* was decided three months before IIRIRA became law. We assume that Congress is aware of the law, *see U.S. v. Georgopoulos*, 149 F.3d 169, 172 (2d Cir. 1998) (citing *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990)), and therefore aware of *Felker*'s mandate when it considered the transitional and permanent rules of IIRIRA. *See Flores-Miramontes*, 212 F.3d at 1139. Had Congress intended that the avenue of review available under 28 U.S.C. § 2241 be repealed, it knew to use more explicit language than it chose.

The INS rests heavily on the phrase "notwithstanding any other provision of law" added to INA § 242(a)(2)(C), codified at 8 U.S.C. § 1252(a)(2)(C) (1999). However, we were not persuaded that the same exact phraseology repealed § 2241 habeas jurisdiction when, in *Jean-Baptiste*, we examined the effect on habeas jurisdiction of INA section 242(g). *See* 144 F.3d at 218. Other courts of appeals have also held that the "notwithstanding" language was not strong enough to repeal habeas jurisdiction. *See Sandoval*, 166 F.3d at 236; *Goncalves*, 144 F.3d at 122. Our holding and our application of it in *Jean-Baptiste* controls our interpretation of the permanent rules and requires a conclusion that the permanent rules do not divest federal courts of jurisdiction to review a criminal alien's legal challenge to his or her removal order.

As for the INS's reliance on § 242(b)(9), we first recognize that § 242(b)(9) does not expressly mention habeas jurisdiction or § 2241. INA § 242(b)(9) is a congressional limitation on judicial review and does not concern habeas jurisdiction. Thus, under *Felker* and our decision in *Jean-Baptiste*, § 242(b)(9) does not constitute a repeal of habeas corpus.

Furthermore, we are not persuaded by the INS that the Supreme Court's characterization of INA § 242(b)(9) as a "zipper clause" requires us to hold that it effects a repeal of habeas jurisdiction. In *AADC*, a group of temporary residents, who belonged to the Popular Front for the Liberation of Palestine, sought injunctive and declaratory relief on the ground that the INS was selectively enforcing the immigration laws against them in violation of their First and Fifth Amendment rights. *See* 525 U.S. at 473-74. The INS sought to dismiss the case for lack of jurisdiction, arguing that INA § 242(g), made applicable to the case by § 306(c)(1) of IIRIRA, deprived the courts of power to hear the appeal. *See id.* at 475. The Supreme Court agreed with the INS that INA § 242(g) deprived federal courts of jurisdiction over the petitioners' selective enforcement case until the deportation orders against them became final, if ever. *See id.* at 482. The Court, however, rejected the "unexamined assumption that § 1252(g) covers the universe of deportation claims" and held that the section covered only the three discrete actions delineated by the statute: the Attorney General's decision to commence proceedings, adjudicate cases, or execute removal orders. *See id.*[5] In *AADC*, the Supreme Court contrasted the narrow scope of INA § 242(g) with INA § 242(b)(9), which it described as an "unmistakable zipper clause" that channels judicial review of all immigration-related decisions and actions to the court of appeals. *Id.* at 482-83.

The Court's description of INA § 242(b)(9) as a "zipper clause" that "channels judicial review" of immigra-

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[5] The Supreme Court thus held that INA § 242(g) applies in a very narrow class of cases. This holding is contrary to our interpretation of that section in *Jean-Baptiste* where we assumed that it governed in the case before us. This distinction has no bearing, however, on our holding in *Jean-Baptiste* that the language of § 242(g) was insufficient to repeal § 2241.

tion decisions to the court of appeals was not a holding that § 242(b)(9) divests federal courts of § 2241 habeas jurisdiction. The discussion of § 242(b)(9) in *AADC* pertained to whether § 242(g) was redundant of § 242(b)(9). By interpreting § 242(g) narrowly, the Supreme Court held that the apparent redundancy was a "mirage." *Id.* at 482. Far from deciding the question what habeas relief remained after IIRIRA, the Court chose not to address the question. *See id.* at 480 n.7 (noting disagreement among the courts of appeals). To repeat, that case did not concern a habeas petition but was a case brought under a federal court's federal question subject matter jurisdiction. *See id.* at 474. Therefore, "that case does not require a conclusion contrary to the rule set forth in *Felker*." *Flores-Miramontes*, 212 F.3d at 1139. Accordingly, we will not presume that the Supreme Court meant its decision in *AADC* to have the radical effect of repealing habeas jurisdiction when it declined to address the issue directly.

As the Ninth Circuit points out, our interpretation that INA § 242(b)(9) does not eradicate 28 U.S.C. § 2241 habeas jurisdiction does not render that section meaningless. *See Flores-Miramontes*, 212 F.3d at 1140. Put differently, § 242(b)(9) forces a legal resident alien in removal proceedings to save all of his or her challenges to an unlawful government decision or action until after a final removal order is issued. Congress enacted INA § 242(b)(9) for the important purpose of consolidating all claims that may be brought in removal proceedings into one final petition for review of a final order in the court of appeals. *See id.* at 1141. Before INA § 242(b)(9), only actions attacking the deportation order itself were brought in a petition for review while other challenges could be brought pursuant to a federal court's federal question subject matter jurisdiction under 28 U.S.C. § 1331. Now, by establishing "exclusive appellate

court" jurisdiction over claims "arising from any action taken or proceeding brought to remove an alien," all challenges are channeled into one petition. *See* 8 U.S.C. § 1252(b)(9); *Flores-Miramontes*, 212 F.3d at 1140-41. Hence, § 242(b)(9) concerns judicial review in a civil action brought under 28 U.S.C. § 1331 rather than review under habeas corpus. Finally, our interpretation of IIRIRA's permanent rules as preserving 28 U.S.C. § 2241 habeas jurisdiction allows us to avoid the serious constitutional question that a repeal of habeas jurisdiction over removal proceedings involving criminal aliens would raise under the Constitution. *See Webster v. Doe*, 486 U.S. 592, 603 (1988) (interpreting a federal statute to avoid a serious constitutional question presented where the statute appeared to foreclose review of constitutional claims); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 348 (1936) (Brandeis *J.*, concurring) (same). The Suspension Clause mandates that "[t]he privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of rebellion or invasion of the public safety may require." U.S. Const. art. 1, § 9, cl. 2. Just recently, Justice Stevens, writing for the Supreme Court majority, remarked that "[t]he writ of habeas corpus plays a vital role in protecting constitutional rights." *Slack v. McDaniel*, ___ U.S. ___, 120 S. Ct. 1595, 1603 (2000). Historically, legal permanent residents ordered removable from this country have been entitled to assert their legal rights in habeas corpus proceedings. *See e.g.*, *Heikkila*, 345 U.S. at 230; *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892); *United States v. Jung Ah Lung*, 124 U.S. 621, 622-23 (1888). Indeed, non-citizens have long been permitted to raise statutory claims, similar to those raised by the petitioners before us, that are based on the executive branch's misinterpretation of the immigration laws. *See Kwong Hai Chew v. Colding*, 344 U.S. 590, 596-600 (1953); *Wong Yang Sung v.*

McGrath, 339 U.S. 33, 48-53 (1950); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 9 (1948); *Delgadillo v. Carmichael*, 332 U.S. 388, 390-91 (1947); *Kessler v. Strecker*, 307 U.S. 22, 28-32 (1939); *Mahler v. Eby*, 264 U.S. 32, 45 (1924). An interpretation that repeals habeas corpus jurisdiction as it applies to legal permanent residents ordered removed from the country because of prior crimes would therefore raise a serious constitutional question under the Suspension Clause of the Constitution.

The INS argues that a constitutional question does not arise if 28 U.S.C. § 2241 jurisdiction is repealed because the constitutionally-mandated amount of judicial review remains under the INA. Specifically, although it acknowledges the broad preclusive language of § 242(a)(2)(C) and the majority of courts' interpretation of it, *see supra* at II. A, the INS assures us that a criminal alien may still obtain review of his or her removal orders pursuant to a petition for review in a court of appeals. It argues that this review includes all that is required by the Constitution—"substantial" constitutional claims and "certain jurisdictional facts" including whether the petitioner is an alien who is removable by reason of having committed a specified criminal offense.

It is true that the Supreme Court has held that Congress may divest the district courts of habeas jurisdiction without violating the Constitution so long as it substitutes "a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention." *Swain v. Pressley*, 430 U.S. 372, 381 (1977). In accord with this principle, we heretofore have recognized the need for adequate judicial review of the legal challenges filed by a criminal alien. We have determined that, because § 242(a)(2)(C) eradicated all review for legal residents ordered removed owing to a prior conviction, habeas review of this class of claims

remains. *See Henderson*, 157 F.3d at 119; *Jean Baptiste*, 144 F.3d at 219; *Hincapie-Nieto*, 92 F.3d at 31.

The INS's interpretation of INA § 242(a)(2)(C) and its definition of what review is required by the Constitution is a misapprehension of the law, in conflict with our prior decisions, and difficult to reconcile with the INS's earlier position taken in *Hincapie-Nieto*. Although a federal court of appeals generally retains jurisdiction under INS § 242(a)(1) to review a legal resident alien's challenge to his or her final order of removal, INA § 242(a)(2)(C) excepts this review for a petition filed by a detained alien ordered removable because of a criminal conviction. *See* 8 U.S.C. § 1252(a)(2)(C). Thus, in *Hincapie-Nieto* and *Jean-Baptiste*, we interpreted § 242(a)(2)(C) as barring all review of a final order of removal entered against an alien removable because of a prior conviction. *Hincapie-Nieto*, 92 F.3d at 30; *Jean-Baptiste*, 144 F.3d at 219. Indeed, in *Hincapie-Nieto*, the INS, contrary to what it asserts here, assured the court that there was no constitutional infirmity with this interpretation because a non-citizen in executive detention could obtain judicial review of his or her deportation order by habeas corpus. *See* 92 F.3d at 31.

Furthermore, in *Jean-Baptiste*, we rejected the very same argument presented by the INS in this case. There, the INS argued that it was unnecessary to preserve habeas jurisdiction to avoid a constitutional question because review of constitutional questions remained available under the INA. Relying on our prior decision in *Hincapie-Nieto*, we held that the INA as amended by IIRIRA takes away that review for legal residents ordered removable because of prior convictions. *See Jean-Baptiste*, 144 F.3d at 219-20. The INS's arguments were "not well taken" in that case, *see id.* at 220, and are received with the same skepticism here. There is nothing in IIRIRA's permanent rules or their legislative history

that indicates that Congress excepted review of substantial constitutional questions under INA § 242.

In addition, the INS's formulation of the review required by the Constitution falls short of the review that we held in *Henderson* is mandated. We found there that even a partial repeal of habeas jurisdiction to hear an executively detained alien's statutory challenges may violate the Suspension Clause. *See* 157 F.3d at 120. In that case, we reasoned that the INS's articulation of the review that is required under the Constitution:

> is drawn from the very different context of successive federal habeas corpus petitions by prisoners in state custody who have already had one or more opportunities for full judicial process and appeals in the state system, with an opportunity for further review in the Supreme Court by a writ of certiorari, and one or more opportunities for review in the federal judiciary on their first habeas petition.

Id. (*quoting Goncalves*, 144 F.3d at 118 n.8). The case of a legal permanent resident alien, in contrast, arises in the setting of executive detention, "a context in which the petitioner[ ] ha[s] never had [his or her] claim[ ] review[ed] by any court, federal or state." *Id.* In this context, circuit courts, including this one, have noted that review of statutory questions similar to the one presented in this case has long been deemed essential to ensure that a detained alien receives full due process of law. *See Henderson*, 157 F.3d at 121 (*citing Gegiow v. Uhl*, 239 U.S. 3, 3 (1915); *Brownell v. We Shung*, 352 U.S. 180, 182 n.1 (1956)); *Goncalves*, 144 F.3d at 124 (citing numerous immigration cases that have considered claims of statutory right)); *see also Mayers*, 175 F.3d at 1300 (citing *United States ex rel. Hintopoulos v. Shaughnessy*, 353 U.S. 72, 78 (1957)); *Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954)).

Furthermore, the language of 28 U.S.C. § 2241 does not contemplate that the writ only extends to a person in custody in violation of the Constitution. Rather, the statute also provides habeas jurisdiction over claims that a person is in custody in violation of federal laws and treaties. *See* 28 U.S.C. § 2241 (providing that the writ of habeas corpus shall extend to a person in custody "in violation of the Constitution or laws or treaties of the United States"). Hence, the literal terms of 28 U.S.C. § 2241 contemplate statutory claims against executive detention.

The substitution of judicial review only of substantial constitutional questions for the habeas review guaranteed under 28 U.S.C. § 2241 therefore does not cure the constitutional infirmity that could result from a repeal of the habeas statute. Without habeas jurisdiction to review final orders, there is currently no judicial review at all of a removal order issued against a non-citizen who is ordered removable because he or she committed a certain crime. Because habeas jurisdiction is constitutionally required where the immigration laws have been interpreted to bar other forms of judicial review under § 242(a)(2)(C), our decision that habeas review remains for a criminal alien's legal challenge to his or her deportation order obviates the profound constitutional questions that would arise if we concluded that all judicial review had been eradicated.

Although not all challenges that an alien may launch against his removal are cognizable under habeas, purely legal statutory and constitutional claims are within § 2241's scope. Thus, a federal court's habeas review includes the claim raised by the petitioners in these consolidated cases—that IIRIRA does not apply to bar the availability of § 212(c) relief for convictions that occurred prior to its enactment. The petitioners challenge the government's refusal to consider an application

for a waiver from deportation and do not ask the court to determine whether the BIA exercised its discretion appropriately. Their claim is a purely legal question that is cognizable under the habeas statute.

We note, as did the Third Circuit in *Liang*, that if we were legislators, rather than judges, we might opt for a statutory scheme under which an alien's constitutional and statutory challenges are cognizable in the court of appeals pursuant to a petition for review. This would eradicate habeas corpus's duplicative review of legal questions in the district court and the court of appeals and serve Congress's goal to streamline judicial review. However, we disagree with the Eleventh Circuit's interpretation of INA § 242(a)(2)(C) in *Richardson II* as permitting review of both statutory and constitutional claims. Although this interpretation may represent sound legislative policy, we reiterate that we do not read IIRIRA or our prior cases to permit such review under INA § 242(a)(2)(C).

Notwithstanding, the question raised by the petitioners is a purely legal matter appropriate for a court, rather than the BIA, to determine. *See Mayers*, 175 F.3d at 1300; *see also Goncalves*, 144 F.3d at 113; *LaGuerre*, 164 F.3d at 1041. It is the type of question that, once answered by the highest court, is answered for all cases that follow presenting the same issue. We therefore believe our decision today that a legal resident alien's pure legal challenges are preserved via habeas corpus to his or her removal order serves to advance Congress's goal of streamlining judicial review.

III. CONCLUSION

We affirm our adherence to the proposition that had Congress intended to strip federal courts of habeas jurisdiction under 28 U.S.C. § 2241 over criminal aliens' statutory and constitutional challenges, it would have done so by making its intent explicit. Because the permanent rules do not mention a repeal of 28 U.S.C. § 2241 or habeas jurisdiction generally, we hold that they do not deprive a federal court of its habeas jurisdiction under § 2241 to review the purely legal claims of criminal aliens against final orders of removal. Because we lack jurisdiction under INA § 242(a)(2)(C) over the petitions for review brought by Calcano-Martinez, Madrid, and Khan challenging their final orders of removal, we dismiss the petitions without prejudice to Khan's pending petition or to the same claims being brought by Calcano-Martinez and Madrid under habeas corpus.

Appendix B

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Buffalo, New York

File No.: A 30 151 244
July 16, 1997

In the Matter of
DEBORIS CALCANO-MARTINEZ

Respondent

IN REMOVAL PROCEEDINGS

CHARGES:

APPLICATION: None.

ON BEHALF OF RESPONDENT:

Ann Doebler, Esquire

ON BEHALF OF SERVICE:

Juliam Miriam, Esquire

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent admitted that she is not a citizen or a national of the United States but a native and citizen of the Dominican Republic who entered the United States at New York, New York on May the 3rd, 1971 as a lawful permanent resident. The respondent neither admitted or denied the final allegation in the Notice To Appear that she was convicted in the Supreme Court of the State of New York, New York for the offense of attempted criminal sale of a controlled substance in the third degree, to wit: heroin, in violation of Section 110/220.39 of the New York State Penal Code.

The Immigration Service in support of that allegation offered Exhibit 9, which is a sentence and commitment order establishing the respondent was, in fact, convicted on April the 24th, 1996 of the attempted criminal sale of a controlled substance and she was sentenced as a result of that. Accordingly, I find that the respondent is deportable as charged in the Notice To Appear, both pursuant to Section 237(a)(2)(A)(iii) of the Immigration & Nationality Act, as amended, in that after admission she has been convicted of an aggravated felony as defined in Section 101(a)43) of the Act. I also find that she is deportable as charged pursuant to Section 237(a)(2)(B)(i) of the Immigration & Nationality Act as amended in that at any time after admission she was convicted of a violation of a law regulating a controlled substance as defined in Section 102 of the Controlled Substances Act, 21 U.S.C. 802, and this was for other than a single offense involving possession of marijuana for one's own use of 30 grams or less. I also find that because of the charges of deportability which have been established, that the respondent is ineligible for any form of relief from deportation.

Accordingly, the following order is entered.

ORDER

IT IS HEREBY ORDERED the respondent be deported from the United States to Dominican Republic.

THOMAS J. PULLIN
Immigration Judge

July 16, 1997

A 30 151 244

Appendix C

Decision of the Board of Immigration Appeals

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

File: A30 151 244 - Buffalo

Dec 30 1997

In re: DEBORIS CALCANO-MARTINEZ
a.k.a. Deboris Calzano a.k.a. Deborah Martinez

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Anne E. Doebler, Esquire
International Institute of Buffalo, Inc.
864 Delaware Avenue
Buffalo, New York 14209-2093

ON BEHALF OF SERVICE:

Joy A. Merriman
Assistant District Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony

Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)] - Convicted of controlled substance violation

In a decision dated July 16, 1997, an Immigration Judge found the respondent subject to removal on the

charges set forth above and determined that the respondent is ineligible for relief from removal. The respondent has appealed. The appeal will be dismissed.

The respondent is a native and citizen of the Dominican Republic who was admitted to the United States on May 3, 1971, as a lawful permanent resident. The Immigration and Naturalization Service submitted evidence that on April 24, 1996, the respondent pled guilty to the offense of attempted criminal sale of a controlled substance, to wit: heroin, in violation of section 110/220.39 of the New York State Penal Law (Exhibit 9).

On appeal, the respondent contends that the Immigration Judge erred in denying her the opportunity to apply for relief under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). The respondent contends that the retroactive application of recent immigration legislation to her case would result in manifest injustice.

Initially, we find that the respondent was properly placed in removal proceedings under section 240 of the Act, 8 U.S.C. § 1229a, by the filing of a Notice to Appear, Form 1-862, with the Immigration Court on June 16, 1997. *See* 8 C.F.R. § 239.1(a) (1997). Although relief from deportation under section 212(c) of the Act is unavailable to an alien in removal proceedings, cancellation of removal under section 240A(a), 8 U.S.C. § 1229b(a), is available to certain lawful permanent residents.[1] The respondent is ineligible for cancellation of removal due to her conviction of an aggravated felony. *See* section 240A(a)(3) of the Act. At the removal hearing, the respondent, through counsel, stated that she did not believe that she is statutorily eligible for any form of

[1] Section 212(c) of the Act was repealed by section 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009.

relief from removal, and she does not indicate any relief for which she may be eligible in her pleadings on appeal Tr. at 11).

Contrary to the respondent's argument on appeal that the amendments to section 212(c) of the Act should not apply retroactively to her case, section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-131, 110 Stat. 1214 ("AEDPA"), rendering section 212(c) relief unavailable to aliens convicted of certain crimes, has been held to apply retroactively to section 212(c) applications pending on the effective date of AEDPA. *See Matter of Soriano*, Interim Decision 3289 (BIA 1996, A.G. 1997).[2] Moreover, despite respondent's contentions on appeal regarding the injustice of recent immigration law, this Board does not have jurisdiction to rule upon the constitutionality of the Act and the regulations. *See* section 103 of the Act, 8 U.S.C. § 1103; 8 C.F.R. § 3.1 (1997); *Liu v. Waters*, 55 F.3d 421 (9th Cir. 1995); *Matter of Feuntes-Campos*, Interim Decision 3318 (BIA 1997); *Matter of C-*, 20 I&N Dec. 529, at 532 (BIA 1992).

ORDER: The appeal is dismissed.

/s/ ILLEGIBLE
FOR THE BOARD

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[2] We note that the amendment to section 212(c) of the Act by section 440(d) of AEDPA relates to aliens in deportation proceedings; the respondent is in removal proceedings, in which section 212(c) relief is not available.

Appendix D

IMMIGRATION COURT
Red Schoolhouse Road
Fishkill, NY 12524

Case A91-251-796
94-A-6379

In the Matter of
*S-MADRID, SERGIO

Respondent

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on Oct 1, 1997. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[X] The respondent was ordered removed from the United States to MEXICO.

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to MEXICO or in the alternative to

[ ] Respondent's application for voluntary departure was granted until upon posting a bond in the amount of $ _____ with an alternate order of removal to

[ ] Respondent's application for asylum was ( ) granted ( ) denied ( ) withdrawn.

[ ] Respondent's application for withholding of removal was ( ) granted ( ) denied ( ) withdrawn.

[ ] Respondent's application for cancellation of removal under section 240A(a) was ( ) granted ( ) denied ( ) withdrawn.

[ ] Respondent's application for cancellation of removal was ( ) granted under section 240A(b)(1) ( ) granted under section 240A(b)(2) ( ) denied ( ) withdrawn. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's application for a waiver under section _____ of the INA was ( ) granted ( ) denied ( ) withdrawn or ( ) other.

[ ] Respondent's application for adjustment of status under section _____ of the INA was ( ) granted ( ) denied ( ) withdrawn. If granted, it was ordered that respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's status was rescinded under section 246.

[ ] Respondent is admitted to the United States as a _____ until _____.

[ ] As a condition of admission, respondent is to post a $ _____ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

[ ] Proceedings were terminated.

[ ] Other: _____

Date: Oct 1, 1997

Appeal: RESERVED Appeal Due By: Oct 31, 1997

/s/ MITCHELL A. LEVINSKY
MITCHELL A. LEVINSKY
Immigration Judge

CLD

Appendix E

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Downstate Correction Facility
Fishkill, New York

File No.: A 91 251 796 October 1, 1997

In the Matter of
SERGIO MADRID,
Respondent

In REMOVAL Proceedings

CHARGES: Immigration and Nationality Act, Section 237(a)(2)(A)(iii), alien who has been convicted of an aggravated felony, Immigration and Nationality Act, Section 237(a)(2)(B)(i), alien who has been convicted of a violation of any law or regulation relating to a controlled substance

APPLICATION: None

ON BEHALF OF RESPONDENT:

Alan Strauss, Esquire
Law offices of Kerry Bretz & Associates
299 Broadway, Suite 810
New York, New York 10007

ON BEHALF OF SERVICE:

Adam Opaciuch, Esquire
Assistant District Counsel

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 25-year old male, native and citizen of Mexico who entered the United States originally without being inspected at an unknown time and place. On December 20th, 1989, the respondent's status was adjusted to that of a lawful permanent resident, pursuant to Section 245(a) of the Immigration and Nationality Act, at New York, New York.

On September 6th, 1994, the respondent was convicted in the State of New York, the County Court, County of Rockland, for the offense of the criminal sale of a controlled substance in the second degree; that substance being cocaine.

On June 11th, 1997, a Notice to Appear was issued charging the respondent with removability pursuant to the above-captioned provisions of the Immigration and Nationality Act. The respondent, through counsel, has admitted all of the allegations of fact c ·ained in the Notice to Appear and has conceded removability.

In support of the allegations of fact, the Immigration Service provided a copy of the respondent's Form I-181, Memorandum of Creation of a File of Lawful Permanent

Residence and a copy of the respondent's conviction records. Based on the respondent's concessions and the evidence of record, removability has been established by evidence which is clear, convincing and unequivocal for the charges set out in the Notice to Appear. *See Woodby v. INS*, 385 U.S. 276 (1966).

Mexico has been designated the country of removal.

The respondent has not submitted any application for relief from removal, but would, if allowed, apply for relief under Section 212(c) of the Immigration and Nationality Act. Section 212(c) of the Immigration and Nationality Act provides aliens lawfully admitted for permanent residence, who have a lawful unrelinquished domicile of seven consecutive years may be admitted to the United States in the discretion of the Attorney General without regard to most grounds of exclusion. If allowed, and if granted, the Section 212(c) waiver would allow this respondent to remain in the United States.

However, the respondent appears to be statutorily ineligible for the relief sought and the request to file relief under Section 212(c) must be pretermitted by the Court. First, as regards to Section 212(c) relief, the Court believes that even if he were in deportation proceedings, rather than removal proceedings, the respondent has been convicted of an aggravated felony as defined in Section 101(a)(43)(b) of the Immigration and Nationality Act, for having been convicted of the criminal sale of a controlled substance.

As such, the respondent comes within the preview of Section 440(d) of the Anti-Terrorism and Effective Death Penalty Act (AEDPA) of 1996. That section stated that an alien who has been convicted of an aggravated felony, or a violation of any law or regulation relating to a controlled substance, is barred from relief under Section 212(c) of the Immigration and Nationality Act.

In her decision, in *Matter of Soriano*, the Attorney General stated that the provisions of Section 440(d) of the AEDPA must be applied to aliens in deportation proceedings applying for Section 212(c) relief on or after April 24th, 1996. Thus, this Court is bound to follow the decision of the Attorney General and deny such relief because the respondent is statutorily ineligible for relief under Section 212(c) of the Act, because of his conviction for an aggravated felony.

Notwithstanding the respondent's statutory ineligibility pursuant to the *Matter of Soriano*, and the AEDPA, the Court believes this respondent cannot apply for Section 212(c) relief in removal proceedings. When Congress created the removal proceedings in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Section 309(c) of that Act, provided that under the transition rules, deportation relief is only available in deportation proceedings and deportation remedies cannot be had in removal proceedings. Conversely, removal relief and relief available in removal proceedings could not be had in deportation proceedings.

The Notice to Appear in these proceedings was filed with the Immigration Court, June 11th, 1997. Notwithstanding the fact that respondent's conviction pre-dates the institution of hearings, and the institution of removal laws, this Court must apply removal laws to this respondent. In doing so, the respondent is statutorily ineligible for cancellation of removal under Section 240(A) of the Immigration and Nationality Act, as amended, because that Section of law provides that cancellation of removal is not available to an alien who has been convicted of an aggravated felony.

Therefore, the respondent is statutorily barred from relief both under removal laws and deportation laws, and the Court is not aware of any relief that is available to this respondent. Notwithstanding the merits of any argu-

ments made by counsel for the respondent, the Court is constrained to follow the Board of Immigration Appeals and the Attorney General in their decisions and cannot adopt the decisions of District Court Judges that are contrary to those of the Attorney General and the BIA.

Therefore, the Court believes that the respondent is without any relief from removal and the following order will be entered:

ORDER:

IT IS HEREBY ORDERED that the respondent's verbal request for relief under Section 212(c) of the Immigration and Nationality Act is denied and the respondent is hereby ordered removed from the United States to Mexico on the charges contained in the Notice to Appear.

Dated: October 1, 1997

MITCHELL A. LEVINSKY
U.S. Immigration Judge

Appendix F

Decision of the Board of Immigration Appeals

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

File: A91 251 796 - Fishkill, New York

Date: May 5, 1998

In re: SERGIO MADRID

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Kerry W. Bretz, Esquire
Bretz & Associates, P.C.
299 Broadway, Suite 810
New York, New York 10007

ORDER:

PER CURIAM. We agree with the Immigration Judge that the record in this case establishes by clear, unequivocal, and convincing evidence, that you are subject to removal as charged. *See Woodby v. INS*, 385 U.S. 276 (1966). No arguments presented during the hearing or on appeal would cause us to disturb this finding.

Regarding relief, we note that you were placed in removal proceedings. Since you are in removal proceedings, a waiver of inadmissibility under section 212(c) is not a form of relief that is available. *See* section 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of

Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-596 ("IIRIRA"). Moreover, you are statutorily ineligible for cancellation of removal pursuant to section 240A(a) of the Act, 8 U.S.C. § 1229b(a), because you have been convicted of an aggravated felony as defined in section 101(a)(43)(B) of the Act; 8 U.S.C. § 1101(a)(43)(B).

You have argued on appeal that AEDPA is unconstitutional. We cannot rule on the constitutionality of laws enacted by Congress. *See, e.g., Matter of Fuentes-Campos*, Interim Decision 3318 (BIA 1997); *Matter of C-*, 20 I&N Dec. 529 (BIA 1992).

Accordingly, your appeal is dismissed.

/s/ ILLEGIBLE
FOR THE BOARD

Appendix G

U.S. DEPARTMENT OF JUSTICE
Executive Office for Immigration Review
Office of the Immigration Judge

Case No.: A 41 602 519
Docket: Danbury, CT

In the Matter of:
KHAN FAZILA

Respondent

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on 7/24/97. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed, the Oral Decision will become the official decision in this matter.

☒ The respondent was ordered removed to Guyana.

☐ Respondent's application for voluntary departure was denied and respondent was ordered deported to _____ or in the alternative to _____.

- ❒ Respondent's application for voluntary departure was granted until _____, with an alternate order of deportation to_____ or _____.
- ❒ Respondent's application for asylum was ( ) granted ( ) denied ( ) withdrawn ( ) other.
- ❒ Respondent's application for withholding of deportation was ( ) granted ( ) denied ( ) withdrawn ( ) other.
- ❒ Respondent's application for suspension of deportation was ( ) granted ( ) denied ( ) withdrawn ( ) other.
- ❒ Respondent's application for waiver under Section _____ of the Immigration and Nationality Act was ( ) granted ( ) denied ( ) withdrawn ( ) other.
- ❒ Respondent's application for _____ was ( ) granted ( ) denied ( ) withdrawn ( ) other.
- ❒ Proceedings were terminated.
- ❒ The application for adjustment of status under Section (216)(216A)(245)(249) was ( ) granted ( ) denied ( ) withdrawn ( ) other. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.
- ❒ Respondent's status was rescinded under Section 246.
- ❒ Other _____

☐ Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

[ILLEGIBLE]
Immigration Judge

Date: 7/24/97

[Handwritten date:] Aug. 25, 997

Appeal: RESERVED/WAIVED (A/I/B)
[word "Reserved" and letter "A"
in the line above have been circled by hand]

Appendix H

U.S. Department of Justice
Executive Office for Immigration Review
Immigration Court

File A 41 602 519

Matter of
KHAN FAZILA,

Respondent

IN REMOVAL PROCEEDINGS

Transcript of Hearing

Before WILLIAM P. JOYCE, Immigration Judge

DATE:

PLACE: Danbury, Connecticut

Transcribed by DEPOSITION SERVICES, INC.
At Rockville, Maryland

OFFICIAL INTERPRETER:

LANGUAGE:

APPEARANCES:

FOR THE IMMIGRATION AND NATURALIZATION SERVICE:

Kim Bingham, Esquire

FOR THE RESPONDENT:

William Bretz, Esquire

JUDGE FOR THE RECORD

This is the United States Immigration Court in Danbury, Connecticut. We're here in the matter of Fazila Khan. File number A 41 602 519.

Miss Khan is being represented telephonically by Mr. William Bretz (phonetic sp.). The Government is being represented by Mr. Kim Bingham (phonetic sp.).

Mr. Bretz has provided pleadings in this case in that Miss Khan acknowledges proper of the service of the Notice to Appear. Agrees to the admissions in the order to Show Cause and concedes that she's the person in the Order to Show Cause and she acknowledges that she's been advised of the purposes of the hearing. She waives a formal reading of the hearing. Admits the factual allegations four through six.

JUDGE TO MR. BRETZ

Q. Now what's your position on this one, Mr. Bretz?

A. Oh, we're denying that that is a conviction for an aggravated felony and that Miss Khan would remain nevertheless eligible for relief.

Q. Now isn't this—well, what's the sentence in this case?

A. (Indiscernible).

MR. BINGHAM TO JUDGE

Q. Your Honor, if I may? We'll offer the convictions.

JUDGE TO MR. BRETZ

Q. Well let me just say, I'm now—Mr. Bingham is handing around copies of the conviction record. Which will be Exhibit 1. She pleaded to an information. Is this—is your position, Mr. Bretz, this is a misdemeanor?

A. Yes.

JUDGE TO COUNSEL

Q. What was the sentence for this? Anybody.

A. (Mr. Bretz) I believe it was for four months.

A. (Mr. Bingham) Four months under page two, Your Honor.

JUDGE TO MR. BINGHAM

Q. Okay. Mr. Bingham, what's your position on this?

A. Well, I do have the Title 21 U.S. Code and I do believe that that would be a felony conviction under Title 21, because it would be punishable for more than a year. Which would then qualify it as a felony and since it's a drug conviction under Title 21, it would automatically be a aggravated felony.

Q. Is it, is it what the—what you're sentenced to or is it what—

A. No, it's the type of crime. If it's Federal felony offense under Title 21—

Q. All right. Well that's the issue, why don't you look it up?

A. Right.

Q. I don't how you can get four months—well, maybe.

MR. BRETZ TO JUDGE

Q. Your Honor, I'd be happy to articulate our argument in writing.

A. Well, Mr. Bingham now is looking at the statute. We'll take a look at it.

MR. BINGHAM TO JUDGE

Q. Can we go off the record for a moment?

JUDGE TO MR. BRETZ

Q. We're going off the record for a second.

(OFF THE RECORD)

(ON THE RECORD)

HEARING CONTINUED

U.S. Department of Justice
Executive Office for Immigration Review
Immigration Court

File A 41 602 519

Matter of
KHAN FAZILA,

Respondent

IN REMOVAL PROCEEDINGS
Transcript of Hearing

Before WILLIAM P. JOYCE, Immigration Judge

DATE:

PLACE:

Transcribed by DEPOSITION SERVICES, INC.
At Rockville, Maryland

OFFICIAL INTERPRETER:

LANGUAGE:

APPEARANCES:

FOR THE IMMIGRATION AND NATURALIZATION SERVICE:

Kim Bingham, Esquire

FOR THE RESPONDENT:

Irwin Berowitz, Esquire

JUDGE FOR THE RECORD

This the Immigration Judge William Joyce. We're here in the matter of Fazila Khan. We've been discussing the matter of the issue that I had asked to be briefed as to whether or not her conviction, her violation of Section 21 U.S.C. 43(b) and (d) brings her within the purview of Section 237(a)(2)(A)(3) in that she's been convicted of an aggravated felony.

It's a technical discussion. It's been well briefed by both parties. I pointed out to the parties, the Board has recently ruled that in Onray Juan Bautista-Hernandez (phonetic sp.) that an individual who was charged as an accessory after the fact did not come within the drug trafficking purview. However, it was my conclusion based on the argument of both sides and in this instance it does and I so hold.

We also then discussed the issue of whether or not she'd be eligible for cancellation of removal and it appears that her conviction of a aggravated felony would bar the availability of cancellation. However, it's a close case and that this my be something the Board may want to address.

Now, with that being said.

Representing Miss Khan is Mr. Irwin Berowitz.

JUDGE TO MR. BEROWITZ

Q. And Mr. Berowitz, you wanted to get something on the record?

A. Yes, a couple of things. Thank you. It's our position that Miss Khan remains eligible for 212(c) relief for the following reasons: All of her acts and her arrests occurred prior to April 24, 1996 and under the holdings of Mohecka v. Reno (phonetic sp.), Judge Winestein's (phonetic sp.) recent decision and Gueshill v. Reno (phonetic sp.), Judge Chen's decision from last week in the Southern District. We believe that—

Q. She—it shouldn't be—

A. (Indiscernible)—

Q. Yeah.

A. Any changes in the law should not be applied retroactively to this respondent.

Q. Let me ask you this counsel?

A. Yes.

Q. Did Judge Chen adopt the same general rational of Judge Winestein?

A. Yes, he did.

Q. Those cases headed up the Circuit?

A. The Mohecka decision can be appealed up until, I think the date is, September 3. Neither party has appeal at this point. And the Gueshill decision will probably be appealed by the Government.

Q. Where did—those cases then just stand for what they were stated in the particular case. I mean there's no precedent there. Am I not correct on that?

A. Correct.

Q. I see. It would be nice if a Circuit would rule on these.

A. All right these same issues are before the 2nd Circuit at this time. It's possible that all—

Q. Uh-huh.

A. Argument will be heard as early as the week of October 13. But I understand that's not really quite set in stone.

Q. I see. So, okay, if, in fact, the 2nd Circuit was to rule favorably for you, this case would have to revisited. Well, all right. As those cases are not precedent at this point and we're bound by Board precedent. I'm going to rule that she's not eligible for 212(c) relief. She is an aggravated felon and therefore, that'll be my ruling. And counsel, you're going to reserve appeal?

A. Yes.

Q. And your, let's see, you need to get that back to the Board by August 25, 1997 and I appreciate you briefing that issue and it'll be interesting to see where we go with it.

A. okay.

MR. BINGHAM TO JUDGE

Q. Your Honor?

JUDGE TO MR. BEROWITZ

Q. All right. Now Mr. Bingham wants to make an observation.

MR. BINGHAM TO JUDGE

Q. Oh, just first of all. I assume counsel is referring to cancellation of removal as oppose to 212(c) since we have a Notice to Appear in this case and not a OSC.

A. Well, I think he's arguing that it doesn't matter. That if, in fact, your crimes were committed before the passage of the Act. It's maybe—

JUDGE TO MR. BEROWITZ

Q. And I don't want to put words in your mouth.

A. You're right, Judge Joyce. That is our position.

Q. That she shouldn't be in cancellation. She should be in—she should be—well, the end of the old law.

MR. BINGHAM TO JUDGE

Q. Also could we have the (indiscernible)

MR. BEROWITZ TO JUDGE

Q. Are we still connected?

A. Yes.

Q. Okay.

MR. BINGHAM TO JUDGE

Q. Could we have the conviction marked as an exhibit?

A. Yeah.

JUDGE FOR THE RECORD

Just for the record purposes, I'm going to go ahead, I'm going to mark the 861, 862 as Exhibit 1. I'm going to mark the conviction as Exhibit 2. The briefs stand for themselves.

And there we are.

JUDGE TO COUNSEL

Q. Does any of the parties have anything else?

A. (Mr. Berowitz) Nothing further today.

Q. Okay.

JUDGE TO MR. BEROWITZ

Q. And the country that she'd be removed to is Ghana?

A. Yes.

Q. Okay. All right. Well thank you very much, sir, and we'll see what happens.

A. Okay.

Q. Thanks.

A. I have a couple of other with you today, should I stay on the line or?

Q. Well, half the problem is getting people out here. Which of the two do you have?

A. Let's see. Odech (phonetic sp.) 832.

Q. It's 8. Could you repeat that, please?

A. Sorry, that's a mistake. I got, let's see. Medina (phonetic sp.) 689.

Q. Six—okay.

A. And I think Amora (phonetic sp.) is on the calendar that's 515.

Q. Yeah, 515. 515. I'm not sure either one of then are out there, but—

A. Oh, okay.

Q. But Amara near the top of our list so. Are you going to be for the rest of the morning?

A. Yes.

Q. Okay. We'll call you—let me just see.

JUDGE TO UNIDENTIFIED PERSON

Q. Is Amara here?

A. Yes.

Q. Okay. Let's send in Amara in about one minute.

JUDGE TO MR. BEROWITZ

Q. Now, let me just explain to Miss Khan.

JUDGE TO MISS KHAN

Q. You've heard all this discussion and basically, what we've done here is—I've gone ahead and ordered that you be removed to Ghana at the conclusion of your sen-

tence. However, as you can see, there's a lot of legal arguments going on as to whether or not you're entitled to some kind of relief and the courts are now examining this issue and I've suggested to counsel that because your case is a close one, he may want to bring it up with the appellant body, the people who review my work. And that's what we've done here. The will go up to them and they'll take a look at it. Okay.

A. All right.

So there still may be hope for you. Okay. And you understand that?

A. Yes, I understand.

Q. Okay.

MR. BEROWITZ TO JUDGE

Q. I'm holding Judge Joyce.

A. Okay. And counsel, Mr. Berowitz, I take it you'll speak to Miss Khan at a later day.

JUDGE TO UNIDENTIFIED PERSON

Q. All right. Well, we're done anyway. We'll have to call him back.

A. Yes.

JUDGE TO MISS KHAN

Q. All right. So he'll talk to you.

A. Okay.

Q. And let me give you a copy of this.

UNIDENTIFIED PERSON TO JUDGE

Q. Should be give her one?

A. Yes.

Q. or just mail it to the attorney?

A. No.

Q. I'll give her the last one.
A. Yeah, give her one too.
Q. Now another one of Berowitz's clients is outside.
A. Okay. So let's bring that gentlemen in.
Q. 515.

UNIDENTIFIED PERSON TO UNIDENTIFIED PERSON

Q. Yes? Take you can have one.
A. (Indiscernible).

JUDGE TO UNIDENTIFIED PERSON

Q. And I don't see a—yes, it is. All right. And we'll go him back.
A. 515.

JUDGE TO UNIDENTIFIED PERSON

Q. We're calling your lawyer.

HEARING CLOSED

CERTIFICATE PAGE

I hereby certify that the attached proceeding before WILLIAM P. JOYCE in the matter of:

FAZILA KHAN
A 41 602 519
Danbury, CT

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

/s/ LINDA S. WADE
(Linda S. Wade, Transcriber)

Deposition Services, Inc.
6245 Executive Boulevard
Rockville, Maryland 20852
(301) 881-3344

December 13, 1997
(Completion Date)

Appendix I

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A41 602 519 - Danbury Date: May 28 1998

In re: FAZILA *KHAN*

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Kerry W. Bretz, Esquire
Bretz & Associates
299 Bradway, Suite 810
New York, New York 10007

ON BEHALF OF SERVICE:
Robert K. Bingham
Special Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act
[8 U.S.C. § 1227(a)(2)(A)(iii)]—
Convicted of aggravated felony

In a decision dated July 24, 1997, an Immigration Judge found the respondent subject to removal on the charge set forth above and determined that the respondent is ineligible for relief from removal. The respondent has filed a timely appeal. The appeal will be dismissed.

I. PROCEDURAL HISTORY

The respondent is a native and citizen of Guyana who was admitted to the United States as a lawful permanent resident on or about September 2, 1987. The respondent admitted that on February 13, 1997, she was convicted in United States District Court, Eastern District of New York, for the offense of use of a telephone to facilitate the distribution of heroin, in violation of 21 U.S.C. §§ 843(b) and (d). Subsequent to a motion for downward departure, the respondent was sentenced to 4 months imprisonment. *See* Tr. at 1; Exh. 2.

On appeal, the respondent presents the following arguments. First, she asserts that her conviction does not support the charge of deportability, because the Immigration and Naturalization Service did not clearly and convincingly establish that drug trafficking was an integral element of her offense. Thus, she denies that she is deportable as charged under section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(iii), as an alien convicted of an aggravated felony as defined in section 101(a)(43)(B) of the Act. Second, she argues that, by finding her ineligible to apply for relief from removal under former section 212(c) of the Act, the Immigration Judge impermissibly subjected her to a new disability for past conduct, in violation of the principle against retroactive application of a new law to past conduct enunciated in *Landgraf v. USI Products*, 511 U.S. 244 (1994). Third, she argues that the recently enacted Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) violates equal protection by barring relief for lawful permanent residents in removal proceedings while allowing similarly situated persons to pursue such relief if they are in either deportation or exclusion proceedings.

In response, the Service argues that the respondent was convicted of a controlled substance offense that is punishable as a felony under Title 21 of the United States Code, and which therefore is a drug trafficking crime. Consequently, the Service contends, she is deportable under section 237(a)(2)(A)(iii) of the Act as an alien convicted of an aggravated felony (as defined in section 101(a)(43)(B) of the Act).

II. THE RESPONDENT'S CONVICTION

The respondent was convicted of use of a telephone to facilitate the distribution of heroin, pursuant to 21 U.S.C. §§ 843(b) and (d). This statute, in pertinent part, provides as follows:

> (b) Communication facility
>
> It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter or subchapter II of this chapter. Each separate use of a communication facility shall be a separate offense under this subsection. For purposes of this subsection, the term "communication facility" means any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures, or sounds of all kinds and includes mail, telephone, wire, radio, and all other means of communication.

(d) Penalties

(1) . . . any person who violates this section shall be sentenced to a term of imprisonment of not more than 4 years, a fine of not more than $30,000, or both; except that if any person commits such a violation after one or more prior convictions of him for violation of this section, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to term of imprisonment of not more than 8 years, a fine of $60,000, or both.

In section (b) above, the language "this subchapter or subchapter II of this chapter" refers to the Controlled Substances Act, Title II of Pub.L. 91-513, Oct. 27, 1970, 84 Stat. 1242.

III. DEPORTABILITY UNDER SECTION 241(A)(2)(A)(iii) OF THE ACT

The respondent concedes that the statute under which she was convicted, 21 U.S.C. § 843(b), indisputably relates to controlled substances. We note that we have held that various inchoate or preparatory crimes are controlled substance violations, within the meaning of the Act, when the underlying substantive crime involves a drug offense. *See Matter of Batista-Hernandez*, Interim Decision 3321 (BIA 1997). Many inchoate crimes "relate to" an underlying controlled substance offense because, although such crimes are not lesser included offenses of controlled substance violations, they nonetheless involve acts closely related to the culmination of the substantive controlled substance offense. *Id.* at 5. We

specifically have held that a conviction for "facilitation" of a drug offense is itself a controlled substance violation. *Matter of Del Risco*, 20 I&N Dec. 109 (BIA 1989); *see also Matter of Beltran*, 20 I&N Dec. 521 (BIA 1992) (solicitation); *Matter of Bronsztein*, 15 I&N Dec. 281 (BIA 1974) (attempt). We concur that the respondent's facilitation offense is a controlled substance violation.

The respondent maintains, however, that a conviction under 21 U.S.C. § 843(b) does not necessarily involve drug trafficking. She disputes the Service's contention that every offense enumerated within the Controlled Substances Act is also a drug trafficking crime. In support of her argument, she cites *Matter of L-G-*, 20 I&N Dec. 905 (BIA 1994), in which the Board held that a single conviction for possession of a controlled substance under Louisiana law was not analogous to a conviction under 21 U.S.C. § 844(a), and thus did not constitute an aggravated felony conviction.[1] Accordingly, the respondent maintains that if she has not been convicted of a drug trafficking crime as defined in section 101(a)(43)(B) of the Act, she is not subject to removal as an aggravated felon under section 237(a)(2)(A)(iii) of the Act.

Addressing the issue of deportability under section 241(a)(2)(A)(iii) of the Act, we note that section 101(a)(43)(B) of the Act, as it applies to the respondent, defines an "aggravated felony" as "illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substance Act), including a drug trafficking

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[1] *But see Matter of L-G-*, Interim Decision 3254 (BIA 1995), in which the Board held (1) that a federal definition applies to determine whether a crime is a "felony," and thus whether it is an "aggravated felony"; and (2) that, for immigration purposes, a state drug offense qualifies as a "drug trafficking crime" (and hence an aggravated felony) if it is punishable as a felony under federal law.

crime (as defined in section 924(c) of Title 18, United States Code)." Section 924(c)(2) of Tide 18 defines "drug trafficking crime" to include "any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.)." *See Matter of L-G-*, Interim Decision 3254 (BIA 1995). Because the respondent was convicted of an offense that is punishable under the Controlled Substances Act (21 U.S.C. § 801 et seq.), the remaining issue to determine is whether her crime is properly characterized as a "felony."

The Controlled Substances Act at 21 U.S.C. § 802(13) (1994) provides: "As used in this subchapter: The term 'felony' means any Federal or State offense classified by applicable Federal or State law as a felony." The definitions under 21 U.S.C. § 802 also apply to the Controlled Substances Import and Export Act, *see* 21 U.S.C. § 951(b) (1994), and the Maritime Drug Law Enforcement Act, *see* 46 U.S.C. App. § 1903(i) (1994). Because the respondent's conviction was for a federal offense, we look to the federal definition of felony to resolve our query.[2]

Under federal law, a felony is an offense that may be punished by a term of imprisonment that exceeds one year. 18 U.S.C. § 3559(a); *see also Jenkins v. INS*, 32 F.3d 11, 14 (2d Cir. 1994). As punishment for her offense, the respondent received a sentence of only 4 months imprisonment. *See* Exh. 2. However, the statute under which she was convicted provides that her crime is *punishable* by "a term of imprisonment of not more

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[2] We note, however, that we also have held that a state drug offense qualifies as a "drug trafficking crime" if it is punishable as a felony under the federal drug laws. *Matter of Davis*, 20 I&N Dec. 536 (BIA 1992); *Matter of Barre*, 20 I&N Dec. 171 (BIA 1990).

than 4 years, a fine of not more than $30,000, or both." 21 U.S.C. § 843(d)(1). Thus, because the crime *may be punished* by imprisonment of more than a year, it is a felony. Moreover, we note that section 101(a)(43)(B) of the Act, which defines as an "aggravated felony" illicit trafficking in a controlled substance (including drug trafficking crimes), does not require that any minimum sentence of imprisonment be imposed in order that a conviction qualify as an aggravated felony. *Compare, e.g.*, section 101(a)(43)(F) of the Act (crime of violence for which sentence of at least one year imposed); section 101(a)(43)(G) of the Act (theft offense for which sentence of at least one year imposed); section 101(a)(43)(J) of the Act (racketeering or gambling offense for which sentence of at least one year imposed); section 101(a)(43)(S) of the Act (obstruction of justice offense for which sentence of at least one year imposed). Consequently, we find that the respondent's crime is properly characterized as an "aggravated felony" under section 101(a)(43)(B) of the Act, and that she therefore is deportable under section 241(a)(2)(A)(iii) of the Act.

IV. RETROACTIVITY AND EQUAL PROTECTION ARGUMENTS

The respondent also argues on appeal that the Immigration Judge, by finding her ineligible for relief from removal under former section 212(c) of the Act, violated the principle against retroactive application of a new law to past conduct. Upon review, we find that the Immigration Judge correctly applied the law. In amending the definition of "aggravated felony" in section 101(a)(43) of the Act, Congress in IIRIRA specifically provided that the provision applies regardless of the date of the conviction: "[n]otwithstanding any other provision of law (including any effective date), the term applies

regardless of whether the conviction was entered before, on, or after the date of enactment of this paragraph." *See Matter of Soriano* Interim Decision 3289 (A.G., Feb. 21, 1997) (amendment to section 212(c) of the Act applied to respondent, who had been convicted in 1992, which was before enactment of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) and before deportation proceedings commenced). Thus, we find no error in the Immigration Judge's determination that the respondent is ineligible for relief, including cancellation of removal under section 240A(a) of the Act, 8 U.S.C. § 1229b(a), owing to her conviction for an aggravated felony. *See* section 240A(a)(3) of the Act.

Finally, the respondent also argues on appeal that IIRIRA violates equal protection by barring relief for lawful permanent residents in removal proceedings. We cannot rule on the constitutionality of laws enacted by Congress. *See, e.g., Matter of Fuentes-Campos*, Interim Decision 3318 (BIA 1997); *Matter of C-*, 20 I&N Dec. 529 (BIA 1992); *see also* section 103 of the Act, 8 U.S.C. § 1103. Moreover, we reject the respondent's argument that the Board should apply the holding in *Mojica v. Reno*, 970 F. Supp. 130 (E.D.N.Y. 1997) and *Yesil v. Reno*, 973 F. Supp. 372 (S.D.N.Y. 1997) (section 440(d) of AEDPA not retroactive). The Board of Immigration Appeals is not bound to follow the published decisions of a United States district court in cases arising in the same district. *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993).

V. CONCLUSION

We find that the respondent was properly placed in removal proceedings under section 240 of the Act, 8 U.S.C. § 1229a, by the filing of a Notice to Appear, Form I-862, with the Immigration Court on May 13, 1997 (Exhibit 1). *See* 8 C.F.R. § 239.1(a) (1997). Furthermore, we conclude that the Immigration Judge properly found the respondent subject to removal under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(iii), as an alien who, at any time after entry, has been convicted of an aggravated felony. *See* section 101(a)(43)(B) of the Act. We concur also with the Immigration Judge's determination that the respondent is not eligible for any form of relief from removal. We note that cancellation of removal under section 240A(a), 8 U.S.C. § 1229b(a), is available to certain lawful permanent residents. However, the respondent is ineligible for cancellation of removal owing to her conviction of an aggravated felony. *See* section 240A(a)(3) of the Act.

The respondent has not established eligibility for any form of relief from removal. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

[ILLEGIBLE]
FOR THE BOARD

Appendix J

1. The Suspension of Habeas Corpus Clause of the United States Constitution, Art. 1, § 9, C1.2, provides:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

2. U.S. Constitution, Art. III provides in pertinent part:

> Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish . . . .
>
> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, . . . to Controversies to which the United States shall be a Party; . . . .

3. U.S. Constitution, Amendment V provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property without due process of law. . . .

4. Prior to April 24, 1996, section 106(a) of the Immigration and Nationality Act, 8 U.S.C. 1105a(a) (1994), provided in pertinent part:

> **Exclusiveness of procedure**
>
> The procedure prescribed by, and all the provisions of chapter 158 of title 28, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation, heretofore or hereafter made against aliens within

the United States pursuant to administrative proceedings under section 1252(b) of this title or pursuant to section 1252a of this title or comparable provisions of any prior Act, except that—

* * * * *

(10) Habeas corpus

any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings.

5. After April 24, 1996, and before September 30, 1996, Section 106(a) of the Immigration and Nationality Act, 8 U.S.C. 1105a(a) (to be codified), provided in pertinent part:

Exclusiveness of procedure

The procedure prescribed by, and all the provisions of chapter 158 of title 28, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation, heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or pursuant to section 1252a of this title or comparable provisions of any prior Act, except that—

* * * * *

(10) Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered by section [1251](a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section [1251](a)(2)(A)(ii) for which both predicate offenses are covered by section

[1251](a)(2)(A)(i), shall not be subject to review by any court.

6. Prior to April 24, 1996, Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c) (1994), provided:

> **Nonapplicability of subsection (a)**
>
> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title. The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

7. Effective April 24, 1996,[1] Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c) (to be codified), provided:

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[1] Section 212(c) was amended by Section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1277, on April 24, 1996. Further technical amendments were made by Section 306(d) of the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-612, on September 30, 1996, and those technical amendments were made effective as if they were enacted on the original enactment date of AEDPA. See p. 82a, *infra*. The version set forth in the text reflects both sets of amendments. In addition, Sec-

Nonapplicability of subsection (a)

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title. This subsection shall not apply to an alien who is deportable by reason of having committed any criminal offense covered by section [1251](a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section [1251](a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section [1251](a)(2)(A)(i).

8. Section 242 of the Immigration and Nationality Act, 8 U.S.C. 1252 (Supp. IV 1998), provides in pertinent part:

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of title 28, except as provided in

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tion 304(b) of IIRIRA, 110 Stat. 3009-597, repealed Section 212(c) entirely, but Sections 306 and 309 of IIRIRA, 110 Stat. 3009-607, 3009-625, make clear that this repeal applies only to aliens placed in removal proceedings on or after April 1, 1997. See pp. 81a-84a, *infra*.

subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

* * * * *

(2)(C) Orders against criminal aliens

Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 1227(a)(2)(A)(ii) for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i).

* * * * *

(b)(9) Consolidation of questions for judicial review

Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this title shall be available only in Judicial review of a final order under this section.

* * * * *

(g) Exclusive jurisdiction

Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or

execute removal orders against any alien under this chapter.

9. Section 401(e) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1268 (Apr. 24, 1996), provides:

> ELIMINATION OF CUSTODY REVIEW BY HABEAS CORPUS.—Section 106(a) of the Immigration and Nationality Act (8 U.S.C. 1105a(a)) is amended—
>
> (1) in paragraph (8), by adding "and" at the end;
>
> (2) in paragraph (9), by striking "; and" at the end and inserting a period; and
>
> (3) by striking paragraph (10).

10. Section 440 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1276 (Apr. 24, 1996), as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (Sept. 30, 1996),[2] provides in pertinent part:

> **CRIMINAL ALIEN REMOVAL.**
>
> (a) JUDICIAL REVIEW.—Section 106 of the Immigration and Nationality Act (8 U.S.C. 1105a(a)(10)) is amended to read as follows:
>
> "(10) Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered

[2] Section 306(d) of IIRIRA, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-612, made certain technical amendments to Section 440 of AEDPA, Pub. L. No. 104-132, 110 Stat. 1276, effective as if included in the original enactment of AEDPA. See p. 82a, *infra*.

by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)-(2)(A)(i), shall not be subject to review by any court."

* * * * *

(d) CLASSES OF EXCLUDABLE ALIENS.—Section 212(c) of such Act (8 U.S.C. 1182(c)) is amended—

(1) by striking "The first sentence of this" and inserting "This"; and

(2) by striking "has been convicted of one or more aggravated felonies" and all that follows through the end and inserting "is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i)."

11. Section 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-597 (Sept. 30, 1996) provides:

REPEAL OF SECTION 212(c).—Section 212(c) (8 U.S.C. 1182(c)) is repealed.

12. Section 306 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-607 (Sept. 30, 1996), as amended by Pub. L. No. 104-302, 110 Stat. 3656 (Oct. 11, 1996),[3] provides in pertinent part:

[3] Public Law No. 104-302, 110 Stat. 3656 (Oct. 11, 1996) made certain technical amendments to Sections 306 and 309 of

APPEALS FROM ORDERS OF REMOVAL (NEW SECTION 242).

* * * * *

(b) REPEAL OF SECTION 106.—Section 106 (8 U.S.C. 110(a) is repealed.

(c) EFFECTIVE DATE.—

(1) IN GENERAL.—Subject to paragraph (2), the amendments made by subsections (a) and (b) shall apply as provided under section 309, except that subsection (g) of section 242 of the Immigration and Nationality Act (as added by subsection (a)), shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under such Act.

* * * * *

(d) TECHNICAL AMENDMENT.—Effective as if included in the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (Public Law 104-132), subsections (a), (c), (d), (g), and (h) of section 440 of such Act are amended by striking "any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i)" and inserting "any offense covered by section 241(a)(2)-(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i)".

13. Section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-625 (Sept. 30, 1996), as amended by Pub. L. No. 104-302, 110 Stat. 3656 (Oct. 11, 1996), provides in pertinent part:

IIRIRA, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-607, 3009-625, effective as if enacted on the original date of enactment of IIRIRA.

EFFECTIVE DATES; TRANSITION.

(a) IN GENERAL.—Except as provided in this section and sections 303(b)(2), 306(c), 308(d)(2)(D), or 308(d)(5) of this division, this subtitle and the amendments made by this subtitle shall take effect on the first day of the first month beginning more than 180 days after the date of the enactment of this Act (in this title referred to as the "title III-A effective date").

* * * * *

(c) TRANSITION FOR ALIENS IN PROCEEDINGS.

(1) GENERAL RULE THAT NEW RULES DO NOT APPLY.—Subject to the succeeding provisions of this subsection, in the case of an alien who is in exclusion or deportation proceedings before the title III-A effective date—

(A) the amendments made by this subtitle shall not apply, and

(B) the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments.

* * * * *

(4) TRANSITIONAL CHANGES IN JUDICIAL REVIEW.—In the case in which a final order of exclusion or deportation is entered more than 30 days after the date of the enactment of this Act, notwithstanding any provision of section 106 of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act) to the contrary—

* * * * *

(G) there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in section

212(a)(2) or section 241(a)(2)(A)(iii), (B), (C), or (D) of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act), or any offense covered by section 241(a)(2)(A)(ii) of such Act (as in effect on such date) for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 241(a)(2)(A)(i) of such Act (as so in effect).

14. Section 2241 of Title 28, United States Code, provides in pertinent part:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

* * * * *

(c) The writ of habeas corpus shall not extend to a prisoner unless

* * * * *

(3) He is in custody in violation of the Constitution or laws or treaties of the United States[.]